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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

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**No. 81-2150**

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JIM MCNEFF, INC., *Petitioner,*

v.

FRANK L. TODD, *et al., Respondents.*

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**On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

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## BRIEF OF THE ASSOCIATED BUILDERS AND CONTRACTORS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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### INTEREST OF THE AMICUS CURIAE

This brief is submitted by the Associated Builders and Contractors as an amicus curiae pursuant to Rule 36 of this Court.

The Associated Builders and Contractors (herein ABC) is a non-profit, voluntary association composed of approximately seventeen thousand construction and construction supply companies. Most of these member companies operate on an open shop basis and are wedded to the "merit shop" philosophy, i.e., that the opportunity to bid and compete for construction work should be exclusively based on a company's ability to operate efficiently and provide quality service at a reasonable cost.

ABC member companies perform the majority of their work in the commercial, industrial and institutional areas. Eighty-five percent of ABC's members do commercial work. It is common practice in the commercial construction industry for general contractors to subcontract work on the same project to both union and nonunion employers. It is also a common practice in the construction industry for union representatives to threaten general contractors with job actions, e.g., work stoppages, work slowdowns or strikes, if nonunion subcontractors are allowed to start work without first signing a union contract. Consequently, many ABC employers have had to confront the dilemma of either signing a pre-hire agreement with a union or foregoing work which they desperately may need.

Unions which have gained pre-hire agreements from ABC members, and thereafter not achieved majority support among the ABC employer's employees, have been allowed by the courts to act as the unit employees' collective bargaining representative for the purpose of judicially enforcing these pre-hire agreements.

The prevailing statutory policy of the federal labor laws is that a union cannot purport to act as the collective bargaining agent for all employees until it is recognized as such by a majority of all the employees in an appropriate bargaining unit. Furthermore, it is not certain that payments toward a union trust fund, on behalf of ABC employees covered by a pre-hire agreement, is to their benefit. As an economic matter these payments might erode wages which otherwise would be paid into an established employee trust fund that is administered by the ABC employer. As a practical matter, the typical ABC employee will not be covered by enough pre-hire agreements, over his lifetime, to satisfy the union trust fund criteria

for receiving benefits. The ABC employer's contributions to union trust funds will thus ultimately be a disservice to his own employees. However, an even greater disservice is done to these employees by courts that enforce these pre-hire agreements when a majority of the employees have never expressed support for the idea of union representation.

Accordingly, the ultimate resolution of the issues presented here is of vital interest and utmost concern to ABC, its members and their employees.

## SUMMARY OF ARGUMENT

The Court of Appeals ignored the spirit and the letter of the decision in *NLRB* v. *Local 103, Iron Workers*, *infra*, by isolating the word "voidable" from the context in which it was used by this Court. Although a "voidable" contract is normally enforceable until repudiated by one of the parties, a pre-hire agreement is not because of the qualifications and exceptions of federal labor policy.

The Court in *NLRB* v. *Local 103, Iron Workers* did not decide the issue of the enforceability of pre-hire agreements in the narrow context of unfair labor practice cases. Rather it examined the panoply of federal labor laws in deciding not to give minority pre-hire contracts the same stature and enforceabiiity as mature collective bargaining agreements.

In the case below, the Petitioner was coerced into sigining a pre-hire agreement in contravention of Congressional intent to only validate collective bargaining agreements between construction employees and minority unions that are arrived at voluntarily.

Courts should not enforce minority pre-hire agreements since the unit employees have never expressed

support for the signatory union and, as a practical matter, many of the employees covered by pre-hire agreements will not be able to qualify for any benefits from the union trust funds.

**I. The "Voidable" Nature Of Minority Pre-Hire Agreements Does Not Mean They Are Fully Enforceable Until Repudiated By One Of The Contracting Parties.**

The Circuit Court below relied heavily on language in *NLRB* v. *Local 103, Iron Workers*, 434 U.S. 335 (1977) to support its characterization of minority pre-hire agreements as "voidable" and enforceable until properly repudiated by one of the parties. The court also relied heavily on contract law principles in finding that a "voidable" agreement is enforceable until repudiated by an affirmative act of one of the parties. The court erred by applying contract law doctrines to an 8(f) contract (see 29 USC § 158(f)) because "[a] collective bargaining agreement is not an ordinary contract for the purchase of goods and services, nor is it governed by the same old common-law concepts which control such private contracts." *Transportation-Communication Employees* v. *Union Pacific R.R. Co.*, 385 U.S. 157 (1966). This is because labor contracts involve the representation rights of employees, not just the employer-union relationship. Not only are contract law principles not entirely applicable to pre-hire agreements, but certain parts of the National Labor Relations Act do not apply as well. Section 8(d) of the Act, 29 USC 158(d), requires that written notice be given to the other party at least 60 days prior to the proposed termination of the contract. However, section 8(d) has been held inapplicable to pre-hire agreements which do not have the stature of collective bargaining agreements. *Trustees of the Atlanta Iron Workers, Local 387 Pension Fund* v. *Southern Stress Wire Corp.*, 509 F. Supp. 1097 (1981).

Moreover, there is nothing in this Court's decision in *NLRB* v. *Local 103, Iron Workers, supra*, that suggests that a pre-hire agreement is enforceable unless the signatory employee sends a written notice to a union exclaiming an intent to dishonor the agreement. Rather this Court in *NLRB* v. *Local 103, Iron Workers, supra*, fully adopted the NLRB's rationale that "a pre-hire agreement is merely a preliminary step that contemplates further action for the development of a full bargaining relationship" and that "Congress merely permitted parties to enter into such pre-hire agreements without violating the Act. It does not mean that failure to abide by such an agreement is automatically a refusal to bargain" *Ruttman Construction Co.*, 191 NLRB 701 (1971).

This Court in *NLRB* v. *Local 103, Iron Workers, supra*, also embraced the NLRB's decision in *R. J. Smith Construction Co., Inc.*, 191 NLRB 693 (1971). The union in *Smith* charged the employer with failing to pay union wage rates and to contribute to the union's trust funds in violation of their pre-hire agreement. The employer and the union had made two separate pre-hire agreements with the union. The first agreement was completely ignored by both parties. The employer did not pay his employees union wages or fringe benefits and the union never sought to enforce the terms of the agreement. The second pre-hire agreement was ignored for the first seven months by the employer and thereafter he only made contributions on behalf of two union member employees but not at all for his nonunion employees. The Board held that "at the time of Respondent's repudiation, indeed at all times the union failed to enjoy majority support" *Smith, supra*, and that the contract was, therefore, never enforceable. The NLRB made no mention in *Smith* or *Ruttman* of a requirement that the (minority) 8(f) agree-

ment also had to be affirmatively repudiated by one of the parties to avoid a bargaining order. In light of this Court's adoption of these Labor Board holdings in *NLRB* v. *Local 103, Iron Workers, supra*, it is clear that its use of the word "voidable" to characterize pre-hire agreements did not mean that an employer could still be liable for union back wages or fringe benefits until he affirmatively repudiated his 8(f) agreement with a minority union. Significantly, this Court did not even feel that 8(f) contracts attained the status of a full collective bargaining agreement *after* the union had achieved majority support among unit employees. In the Court's view an 8(f) agreement is not protected by the "contract bar" rule that normally protects incumbent unions from challenge to their bargaining representative status during the term of the contract. "The employer and its employees and the union itself for that matter may call for a bargaining representative election at any time." *Id.* at 352; and that the enforceability of an 8(f) agreement was contingent upon the union attaining majority support at the various jobsites. *Id.* at 352. Cf. *Dee Cee Floor Covering*, 232 NLRB 421 (1977) ["the mere fact that the Union might indeed have represented a majority of the employees at the employer's jobsite is of no consequence since the union must demonstrate its majority status at each new jobsite in order to invoke the provisions of section 8(a)(5)"].

### II. The Court Below Wrongly Concluded That The Enforceability Of Pre-hire Agreements Was Resolved By This Court In *NLRB* v. *Local 103, Iron Workers*, 434 U.S. 335 (1977), Only As To Unfair Labor Practice Cases

Several Circuit Courts of Appeals have wrongly limited the holding of this Court in *NLRB* v. *Local No. 103, Iron Workers, supra*, to the narrow factual context in

which the case arose. *See Contractors, Laborers, Teamsters and Engineers Health and Welfare Plan* v. *Associated Wrecking Co.*, 638 F.2d 1128 (8th Cir. 1981); *New Mexico District Council of Carpenters* v. *The Mayhew Co.*, 664 F.2d 215 (10 Cir., 1981). In reaching their decisions the Eighth and Tenth Circuits distinguished *NLRB* v. *Local 103, Iron Workers, supra*, on the basis that this Court had discussed the nature of pre-hire agreements in the context of unfair labor practice charges only and not, as in *Associated Wrecking* and *Mayhew*, in the context of a section 301 breach of contract suit. In *Associated Wrecking* the court concluded that the fringe benefit provisions (i.e., employer contributions to various union trust funds) of a pre-hire agreement could be enforced against the employer in a breach of contract action even though the union's majority status had never been demonstrated. While it is true that *NLRB* v. *Local 103, Iron Workers* did not factually deal with the question of the nonenforceability of a pre-hire agreement as a defense to a breach of contract suit, this Court clearly spoke to that very issue. The union in *NLRB* v. *Local 103, Iron Workers, supra*, asserted that by permitting an employer to repudiate a pre-hire agreement until the union attains majority support rendered the contract unenforceable and, therefore, contrary to this Court's decision in *Retail Clerks International Ass'n* v. *Lion Dry Goods, Inc.*, 369 U.S. 17 (1962). This Court explained that its decision in *Lion Dry Goods* merely held that federal courts have jurisdiction to entertain a section 301 suit based on a section 8(f) contract, but that "it would not be inconsistent . . . to hold that the union's majority standing is subject to litigation in a section 301 suit to enforce a section 8(f) contract, just as it is in a section 8(a)(5) unfair labor practice proceeding, and that absent a showing that the union is the majority's chosen instrument, the contract is unenforceable." *Id.* at 352.

The Eighth and the Tenth Circuits ignored this unequivocal language in upholding the enforceability of the subject pre-hire agreements. In addition, these Circuits mechanically applied the decision in *Lewis* v. *Benedict Coal Corporation*, 361 U.S. 459 (1960), in holding that an employer could not raise normal contract law defenses against union pension fund trustees in a section 301 suit for damages. In *Benedict*, this Court held that a contract that called for contributions to a union pension fund was not a typical third party beneficiary contract, in that the employer could not assert the union's breach of contract as a defense in an action brought by the trustees. Unlike the employer in *Benedict*, the employer here is not a member of any multi-employer bargaining association and has not assumed or been given any responsibility for the management of the union trust funds. Second, and even more significant, the employer in *Benedict* was signatory to a collective bargaining agreement; the consequence of the union having successfully organized Benedict's employees and thereafter being certified as their collective bargaining representative by the National Labor Relations Board. Here, no organizing campaign has ever been attempted, and the employer has not entered into a "long term relationship" with the union but merely a pre-hire agreement with a *minority* union.

This Court recently dimmed the vitality of *Benedict* by upholding employer defenses to collection suits by union pension trustees that are not "unrelated" or "extraneous" to the enforceability of the underlying collective bargaining agreement. *Kaiser Steel Corp.* v. *Mullins*, 102 S.Ct. 851 (1982). The employer in *Benedict*, *supra*, when sued by the trustees for delinquent contributions, defended on the ground that the union had violated the no strike clause contained in the contract. Although the strikes were illegal, the Court held that the company's promise to con-

tribute to the fund was independent of and not conditioned on the union's performance of its promise not to strike. Unlike the employer in *Benedict*, *supra*, the employer in the case below had an obligation to contribute to the union pension fund, that had as a condition precedent, the obtaining of majority support by the union among his employees.

The satisfaction of this condition precedent by the union is not "unrelated" or "extraneous" to the obligation that the employer may have to contribute to the union trust funds. The employer's duty to bargain and honor the contract is contingent on the union attaining majority support at the various jobsites. *NLRB* v. *Local 103, Iron Workers*, *supra*.

Congress did not intend to preclude employers from raising contractual defenses because of the language of Section 306(a) of the Multiemployer Pension Plan Amendments Act of 1980, Pub.L.No. 96-364, 94 Stat. 1208, which provides in part that "every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or agreement." 29 USCA § 1145. Assuming *arguendo* that the 1980 amendments are applicable to the case below, the employer would still not be obligated. Nothing could be more "inconsistent with law" than to judicially enforce a minority pre-hire agreement that has been cashiered by the NLRB in a companion unfair labor practice case proceedings because the union failed to demonstrate its majority status among the unit employees. The National Labor Relations Board has been given by Congress the primary responsibility of effectuating national labor poli-

cy. *Labor Board* v. *Truck Drivers Union*, 353 U.S. 87 (1957). It unquestionably frustrates national labor policy to judicially enforce collection suits brought against employers by union pension trustees for union trust fund payments when the same claim has been rejected by the NLRB in a prior unfair labor practice case because the union never achieved the status of collective bargaining representatives among the unit employees. Nothing in section 306(a) of the Multiemployer Pension Plan Amendments Act assumes that "Congress implicitly repealed the antitrust laws, the labor laws, and any other statute which might be raised as a defense to a provision in a collective bargaining agreement requiring an employer to contribute to a pension fund." *Kaiser*, *supra*.

As the third party beneficiary of the union-employer pre-hire agreement, the trustees of the union trust funds can assert no greater collection rights than that of the union. Since the union cannot enforce the agreement until it achieves the employee designation required by federal labor policy, it follows that the trustees should not be allowed to sidestep this statutory obligation by the simple expedient of suing in its own name.

### III. Most Nonunion Employees Will Never Work On Enough "Covered" Projects To Qualify For Any Benefits Of The Union Trust Funds

Most employees who have chosen the "merit shop" way of employment are going to seek out employers who share their work philosophy. A typical ABC employee works approximately two thousand hours a year at construction. The minimum requirement to receive a full pension from an AFL-CIO construction union is that an individual member work for at least ten years at a thousand hours per year (see Appendix).

This means that an open shop employee would have to string together ten years of pre-hire agreement employment at a thousand hours per year before being eligible for union pension benefits. This is highly unlikely because most open shop employers are able to avoid signing any union contract for any length of time. Furthermore, those open shop employers who find no alternative but to sign a pre-hire agreement will not be inclined to simultaneously contribute money into both the health and welfare fund he has set up for his employees and the health and welfare fund belonging to the signatory union. The open shop employer will most likely suspend payment into his own established employee health and welfare fund while he contributes monies into the pre-hire agreement trust funds on behalf of his "covered" employees. As an economic matter, these payments will erode open shop employee wages which otherwise would be paid into an employer established employee trust fund. Therefore, it would be highly inequitable to allow a construction union, which in most cases will never be required to make benefit payments to open shop employees covered by an occasional pre-hire agreement, to enforce these agreements unless at some time during the term of the contract the union was able to convince a majority of the employees that unionization was in their best interests. It is "freedom of choice which is the essence of collective bargaining" *IAM* v. *NLRB*, 311 U.S. 72, 79 (1940).

### IV. The Court Below Erred In Finding That Petitioner Was Not Coerced Into Signing A Pre-Hire Agreement

"Congress was careful to make its intention clear that pre-hire agreements were to be arrived at voluntarily, and no element of coercion was to be admitted into the narrow exception being established to the majority principle." *NLRB* v. *Local 103, Iron Workers*, *supra*, at 348

n. 10. The House Conference Report on section 8(f) clearly established that no coercion of any sort was to be utilized to exact pre-hire agreements from unwilling contractors:

> "Nothing in such provision is intended . . . to authorize the use of force, coercion, strikes, or picketing to compel any person to enter into such pre-hire agreements." H.R. Rep. No. 1147 on S. 1555, 86th Cong., 1st Sess. (1959), I Legislative History of the LMRDA of 1959, p. 946.

The facts in the present case and those in *NLRB* v. *Local 103, Iron Workers, supra*, are quite similar. Both cases involved a request by a business agent that the contractor sign a pre-hire agreement, followed by a refusal to sign, followed by coercive conduct by the union. In the former, Petitioner refused a union business agent's request to sign a pre-hire agreement, which was followed by a visit and demand from the general contractor that he sign or get off the jobsite. In the latter case, the unwilling contractor's refusal to sign a pre-hire agreement was followed by a picket line. The employer in *NLRB* v. *Local 103, Iron Workers, supra*, was not forced by the business agent to immediately leave the jobsite. In the present case, the business agent put pressure on the general contractor to remove Petitioner from the jobsite, at once, if he did not sign a pre-hire contract.

A threat to force a general contractor to cease doing business with a subcontractor is coercive and, therefore, unlawful under the National Labor Relations Act's secondary boycotts. *NLRB* v. *Denver Bldg. Trades Council*, 341 U.S. 675, 688 (1951).

As this Court said in *NLRB* v. *Local 103, Iron Workers, supra*, "section 8(b)(7) was adopted to ensure voluntary, uncoerced selection of a bargaining representative by employees, we cannot fault the Board

for holding section 8(b)(7) applies to a minority union picketing to enforce a pre-hire contract." Likewise, it would be flatly contrary to the broad congressional ban upon illegal secondary boycotts to ignore the realities of the coercive union activity in the present case.

## CONCLUSION

This Court in *NLRB* v. *Local 103, Iron Workers*, *supra*, deferred to the expert judgment of the National Labor Relations Board in finding that minority 8(f) agreements are unenforceable until the union has achieved majority support among the unit employees. The union's trust fund trustees stand in no better position than the union does in asserting the enforceability of 8(f) agreements.

For the reasons stated above, as well as those presented by Petitioner, the Associated Builders and Contractors urges this Court to reverse the below decision of the Court of Appeals.

Respectfully submitted,

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# APPENDIX

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## Pension Characteristics & Criteria - National Funds

| Craft | Requirement to Receive Full Pension | Vesting | Hours to Receive Full Credit for Year | Required for Credit of Past Service | Basis of Benefits of Normal Pension |
|---|---|---|---|---|---|
| Bricklayers | Age 65 with 10 years pension credit including 1,500 hours future service or 10 years vested service. | 10 years vesting service (1,000 hrs/yr) or 10 pension credits including 5 of future service. | 1,500; 10% credit for each 150 hours. | 750 hours worked in 2 of 3 years prior to contributions or 5 years future service; year credit per 750 hours. | Contributions for last 1,500 hours (see table). |
| Carpenters[1/] | | | | | |
| Electricians[2/] | Age 65 with 10 years employment. | 10 years employment. | 1,000; partial credit for each hour in years with more than 300 hours worked. | Not specified; 5 years maximum credit. | $6 per year of service credit. |
| Elevator Constructors | Age 65. | 10 years employment and 12,000 hrs. in a 10-year period. | Credit for each hour in years with more than 700 hours worked. | Health & Welfare fund contribution for each month of service prior to 6/62. | $15 per year of past service and 1,700 hours of future service. |
| Laborers | Age 65 with 10 years pension credit, including 4 quarters of contributions. | 10 years credited service, including 5 with contributions. | 1,000; 25% credit for each 250 hours. | Annual earnings greater than or equal to 50% of Social Security base amount. | Contributions for last 1,000 hours. |
| Operating Engineers | Age 65 with 10 years vested service. | 10 years service at 1,000 hours per year. | 1,000; 10% credit for each 100 hours in years with more than 400 hours worked | Years worked after age 35. | 2% of total contribution plus 20 times average hourly contribution times past service years. |

*Statistics compiled by the Construction Labor Research Council, a service bureau of the AFL-CIO, Building Trades Council and the Associated General Contractors.

| Craft | Requirement to Receive Full Pension | Vesting | Hours to Receive Full Credit for Year | Required for Credit of Past Service | Basis of Benefits of Normal Pension |
|---|---|---|---|---|---|
| Painters/ Glaziers 3/ | Age 65 with 3,000 units of credit (25 years), including 12 units of contributions. | 10 years service at 1,000 hours per year. | 1,800; 1 unit for each 150 hours. | 900 hours worked in 2 of 3 years prior to contributions; 1 unit/75 hours worked up to 12 in year. | Contributions for last 12 units (see table). |
| Pipefitters/ Plumbers | Age 65 with 25 years pension credit, including 1 year of contributions. | 10 years credits at 870 hrs. per yr. | 1,500; 10% credit for each 150 hours. | 2,250 hours worked in 3 years prior to contributions (750 with contributing employer), then credit for years with 750 hours. | Contribution for last 1,500 hours (see table). |
| Sheet Metal Workers | Age 65 with 25 years credited service, including 12 months future service credit. | 10 years vested service, including 5 years of future service. | 1,200; 8.33% credit for each 100 hours. | 150 days worked or $2,500 earned in 2 of 3 years prior to contributions or 60 months future service. | Contributions for last 12 months. |

1/ Trustee and administrator did not supply data.

2/ Usually also a local pension.

3/ Maximum of 24 years past service.